No. 85-418

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

SARA CRAWFORD, Special Administrator of the Estates of SCOTT W. PAWLISA, Deceased and BRIAN PAWLISA, Deceased, as Administrator,

*Petitioner,*

vs.

JERRY EDMONSON, Individually and as a Police Officer of the City of Centralia; KERMIT JUSTICE, Individually and as Chief of Police of the City of Centralia; and CITY OF CENTRALIA, a municipal corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the trial court abuse its discretion by admitting evidence of certain prior criminal acts alleged to have been committed by Plaintiff's decedents, Brian and Scott Pawlisa?

2. Did the trial court abuse its discretion by permitting the testimony of Cheryl Sprehe concerning the details of the armed robbery committed by decedents immediately prior to their deaths?

3. Did the trial court abuse its discretion in admitting evidence which allegedly corroborated Defendant Edmonson's state of mind?

4. Did the trial court err in denying Plaintiff's motion for a directed verdict against Defendant Edmonson as to decedent Scott Pawlisa on the issue of liability?

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## PETITION FOR WRIT OF CERTIORARI

### OPINION BELOW

Crawford, et al v. Edmonson, et al, 764 F.2d 479 (No. 84-2731), opinion of the United States Court of Appeals for the Seventh Circuit (See Appendix)

## JURISDICTION

Petitioner's case was tried to a jury before the Honorable William L. Beatty, United States District Court for the Southern District of Illinois. A verdict was returned in favor of all Defendants on June 14, 1984, and the Court entered judgment thereon. Her motion for a new trial was denied July 20, 1984. An appeal was taken and the judgment was affirmed by the United States Court of Appeals for the Seventh Circuit on June 13, 1985. The jurisdiction of this Honorable Court is invoked pursuant to 28 United States Code, Section 1254.

## CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

### Fifth Amendment, United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Section 1, 14th Amendment of the United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Eighth Amendment to the United States Constitution**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Rule 401 of Federal Rules of Civil Procedure Evidence**

**Rule 401. Definition of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 403 of Federal Rules of Evidence**

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Rule 404 of Federal Rules of Evidence**

**Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**

**(a) Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

**(1) Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

**(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

## STATEMENT

Petitioner filed her original complaint with the United States District Court for the Southern District of Illinois in December 1981. She alleged that the Defendants had violated the civil rights of the decedents, her two sons. She also alleged causes of action arising under the Illinois Wrongful Death Act and the Survival Act. A trial held in November 1983 resulted in a mistrial because of a hung jury. The case was retried in June 1984, although Petitioner dropped the state causes of action and proceeded only under Section 1983. A verdict was returned in favor of all defendants. After denial of her new trial motion, Petitioner filed an appeal with the United States Court of Appeals for the Seventh Circuit. It is from that Court's affirmance of the judgment that she takes this petition.

Scott Pawlisa and Brian, his younger brother, robbed a Long John Silver's fast-food restaurant in Centralia, Illinois on the

night of December 21, 1979. While fleeing the scene, the boys were shot in the back by Defendant Jerry Edmonson, a Centralia police captain. (R. 35) Scott, struck in the back by five pellets of 00-buckshot, died within an hour. (R. 255) Brian was hit in the back by six pellets but lived for some twenty hours before dying from his wounds. (R. 255) Scott Pawlisa was eighteen years old. His brother Brian was seventeen. (R. 266)

Two days prior to the robbery, Defendant Kermit Justice, Centralia's Police Chief, had received a tip from the police chief of a neighboring community that a robbery of Long John Silver's was planned. According to the source, the restaurant would be robbed either Friday or Saturday at closing-time, an employee would be involved, it would be an armed robbery and Brian and Scott Pawlisa would be involved. (R. 45-47)

No attempt was made to stop the robbery nor was the restaurant's management informed by the police of the planned robbery. (R. 47-49) On the evening of Friday, December 21, 1979, Justice called a meeting to discuss a "plan of operations" for a stake-out of the restaurant. Attending the meeting were Defendant Edmonson, Captain Qualls, detectives Simer and Shaw, and patrol officers Feig, Falkner, Densmore, Beach, and Forehand. (R. 51-53)

All of the officers were assigned stake-out positions. Edmonson, Simer and Shaw were positioned in vehicles near the rear entrance of Long John Silver's. Justice and Qualls covered the restaurant's front entrance from a fire station across the street. The patrol officers were ordered to take up positions along the area's perimeter. All of the police were armed with .357 magnum service revolvers and 12-gauge riot guns, loaded with 00-buckshot. The officers were equipped with walkie-talkies, and standard police radios were in the patrol units. At approximately 9:15 p.m., the police were in position around the restaurant. (R. 54-60)

Between 9:30 and 10 p.m., a white Chevy was observed circling the Long John Silver's. Brian Pawlisa was identified as an

occupant, although the others in the car were not identified. Shortly after 10 p.m., two persons jumped out of the Chevy which stopped near the rear entrance of Long John Silver's. They ran across a vacant field and hid beneath a trailer in a neighboring yard. (R. 238-239) Defendants Justice and Edmonson and Captain Qualls all testified that they had been unable to identify the two figures. The Defendants also testified that Detective Simer, who was viewing the activity through binoculars, did not identify either of the boys to them. (R. 64-65, 101, 136) After Simer later testified that he had identified Brian when the boy exited the car, Edmonson changed his story to conform to that of his partner. (R. 239, 276-280)

The two boys were under constant surveillance for fifty minutes prior to the robbery. However, all of the officers denied having "probable cause" to stop or arrest the boys despite the fact that both Qualls and Justice observed them with masks and carrying what the officers believed to be guns. (R. 73, 102) Simer and Justice testified that probable cause did not exist until a gun was positively identified. Yet, Simer ordered Officer Forehand to stop the driver of the white Chevy. He testified that probable cause existed to make that stop merely because he "wanted to know who [the driver] was." (R. 82-84, 251, 284)

Probable cause was established, according to Justice, some two to three minutes before the boys entered the restaurant. (R. 82) Justice said no arrests were attempted then because he wanted to get the patrol units onto the lot adjoining the Long John Silver's. (R. 77) The five patrol officers testified, however, that they were never ordered onto the lot and had in fact been at their assigned positions at least twenty minutes prior to the robbery. The sergeant in command of the patrol officers testified that he had informed Justice between 10:20 and 10:30 that the units were in position. (R. 195, 198, 201, 204, 207, 209)

After the boys entered the restaurant, Edmonson, Simer and Shaw got out of their vehicles and took up positions within several yards of the rear door. Minutes later, two masked

figures exited that door, one of whom carried a gun. These three officers each testified to shouting "Halt, police!" at least three times before any shots were fired. (R. 224, 149, 245-246)

A total of three shots were fired, all of them by Edmonson. The Defendant did not remember firing the first shot, which was aimed into the air. He did not intend to fire and it was not a warning shot. (R. 150) The two shots that followed, according to Edmonson's own testimony, were aimed at the armed figure running in front. This boy was later identified as Brian Pawlisa. Edmonson denied having aimed at the other boy, Scott. Edmonson was unaware that Scott fell first. In fact, he did not realize that Scott was hit at all. The other officers who witnessed the shooting all testified that Scott was hit first. Scott was unarmed. In Brian's hand was found a replica of a .36 caliber Colt Navy Revolver, a type of cap and ball pistol used in the Civil War. It was unloaded and inoperable.

## EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Southern District of Illinois had jurisdiction over Petitioner's cause of action pursuant to 28 United States Code, Sections 1331 and 1343, and 42 United States Code, Sections 1983 and 1988. The United States Court of Appeals for the Seventh Circuit had jurisdiction over Petitioner's appeal pursuant to 28 United States Code, Section 1291.

## ARGUMENT

1. The central theme of the defendants' case was that Brian and Scott Pawlisa were known by the police to be dangerous and violent lawbreakers (R. 6). Indeed, defendants' attorney stated that the "heart of the case" was that Edmonson reasonably perceived a threat to himself and the other officers at the time he fired the fatal shots. This belief was based entirely upon Edmonson's "knowledge" of certain past "incidents" allegedly involving the Pawlisas. Plaintiff asserts that the admission of this "evidence" was not only entirely without probative value, but so highly prejudicial that it denied her a fair trial. So crucial was this blatantly prejudicial evidence to the defense that defendants' counsel invited the trial court:

> If we can't prove their perception of fear was legitimate, you might as well direct a verdict for the plaintiff. (R.6)

Rule 403 of the *Federal Rules of Evidence* states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury...

Testimony regarding the three "incidents" did not prove that Edmonson's "perception of fear was legitimate". It was calculated to posthumously try the boys for past "crimes" in a successful effort to poison the jury's collective mind and to distract it from the real issues properly before it.

Despite defendants' assertion that this evidence of prior misconduct was offered solely to prove Edmonson's state of mind, it is obvious that this was inadmissible evidence of the decedents' characters. Rule 404 of Federal Rules of Evidence is concerned with the admission of such character evidence in criminal trials. In rejecting the argument that Rule 404 should extend to civil cases, the Advisory Committee quoted approvingly from the California Law Revision Commission to the effect that:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

## A. THE CROSS-BURNING INCIDENT

The court permitted testimony regarding the Pawlisas' participation in a cross-burning incident in May 1979. Defendant Edmonson testified about the incident although he admitted that he had not participated in its investigation. (R. 123-24). According to Edmonson, the Pawlisas and others had constructed a cross and set it afire in Centralia's black community. Furthermore, he stated that Brian Pawlisa had fired a .44 magnum pistol six times into the air during the incident. (R.164). Edmonson testified that the gun was obtained from the boys' father, James Pawlisa, although the elder Pawlisa denied ever owning such a pistol. (R.257). Edmonson went on to testify that the boys "laid in wait with guns for the blacks to come up and retaliate." (R.165).

In spite of their involvement, the Pawlisa brothers were not charged with any offense involving firearms. (R. 92, R. 162). In fact, no charges of any kind were filed against Scott, and Brian was charged only with disorderly conduct. (R. 92).

Edmonson's knowledge of this incident was based solely upon notes taken by Lieutenant Upchurch, Centralia's juvenile officer. (R. 123) Lieutenant Upchurch relied, again according to Edmonson, upon information supplied by Dan Donohoo. (R. 124, R. 185-186). Donohoo, an alleged participant in the cross-burning, volunteered information about the Pawlisas involvement after being implicated by Brian. (R. 163-164). Edmonson admitted that Donohoo's confession was the only

"evidence" linking either of the Pawlisas brothers to the use of firearms at the cross-burning. (R. 123-124). Furthermore, Edmonson did not know whether Donohoo was a reliable source of information. (R. 184). It was Defendants' own evidence that no one was fired upon nor was any person threatened with a gun. Most telling of all is the uncontradicted fact that no charges involving firearms were filed against the Pawlisas.

Defendants failed to demonstrate how Edmonson was able to transform his third-hand "knowledge" of the Pawlisas' involvement in this affair into a reasonable belief that the boys were potential killers. This failure destroys both the purported basis for the introduction of this evidence and its probative value as to Edmonson's state of mind. Even if the jury believed that the Pawlisas were somehow linked to the use of firearms, this evidence had no probative value to weigh in the balance against the unfair prejudice caused by its introduction. *Bowden v. McKenna,* 600 F.2d 282, 284 (1st Cir. 1979).

**B. THE COLLINS BOY.**

The Pawlisa brothers were present when Jimmy Collins, a friend, shot himself in the leg. Defendants convinced the trial court that this was still more "evidence" that the brothers were prone to use firearms. Aside from its blatantly prejudicial nature, this evidence is utterly irrelevant and fails to meet the standard of Rule 401 of the *Federal Rules of Evidence,* which states:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence.

Defendants' counsel made highly effective use of this non-incident in both his opening statement and closing argument. In his opening remarks to the jury, defendants' counsel described the shooting as follows:

> [T]he Pawlisa boys and Dr. Collins' son were together doing something with a gun and the gun discharged. (R. 29).

While he admitted in closing that there was "nothing to indicate" that either Pawlisa had shot Collins, counsel returned to his opening theme by hinting darkly that, "something was going on with the gun." (R. 333). Defendants' counsel piously concluded by remarking: "Thank goodness no one was killed." (R. 333).

The fact remains that Defendant Edmonson admitted that the Pawlisas were merely present and further that Jimmy Collins shot himself. (R. 125). There is not the slightest suggestion that anything was "going on" between that gun and the Pawlisas. Any such "goings on" existed solely in the rhetoric of defendants' counsel and, as a consequence, in the mind of the jury.

It is impossible to translate this occurrence into a basis for a reasonable belief that the Pawlisas were dangerous young men. Guilt by association is not sufficient to indict them. The extent of the damage unfairly done to plaintiff's case by the admission of such specious "evidence" is incalculable. While the Seventh Circuit "would have preferred to see the evidence excluded," it did not feel that his sort of misconduct would convince the jury that Brian and Scott had gotten what they deserved. This might be true, if viewed in isolation. However, this incident was not isolated. It was presented as an important link in the chain of events leading to Edmonson's "reasonable belief."

### C. THE HARDEE'S CAPER.

A Hardee's restaurant was robbed some three months prior to the Long John Silver's robbery. "Evidence" of the Pawlisas alleged involvement in the Hardee's robbery was introduced as further substantiation of Edmonson's "belief."

Edmonson, one of the officers investigating the robbery, "suspected" that the Pawlisas were involved. Although the

robbery occurred on September 28, 1979, Edmonson admitted that no one had been charged with the crime at the time Brian and Scott were killed. (R. 125). The police never so much as questioned the Pawlisa brothers about the Hardee's robbery. (R. 125).

According to Edmonson, four persons wearing masks entered the Hardee's at closing time and threatened the restaurant employees at gunpoint. (R. 167-168). Edmonson testified that on the morning following the robbery, he was contacted by Richard Rich, the Dean of Students at Centralia High School, who had heard some student gossip about the robbery. (R. 126). Rich said that Brian Pawlisa's girlfriend was bragging to other students about how her boyfriend had robbed Hardee's. (R. 126, R. 169). That was the extent of the investigation until April 1980, when police took a statement from Don May, a Hardee's employee. May had been working on the night of the robbery and implicated himself and the Pawlisas in that statement. This was some four months after Edmonson had shot and killed the Pawlisa brothers.

No Centralia police officer attempted to question Brian's girlfriend. Edmonson had no idea if she was a reliable source. Edmonson failed to record her name in the "notes" he allegedly took at Rich's office, even though she would have been an important witness. Indeed, it is quite clear from Edmonson's testimony that he never even knew her name. (R. 186-187). The original statement given by May immediately after the robbery does not name the Pawlisas as being involved. (R. 127-128). The only "evidence" the police had which linked the Pawlisas to the Hardee's robbery was the student gossip purportedly conveyed to Rich and allegedly passed along to Edmonson. This fourth-hand hearsay, scribbled in a note that Edmonson claimed to have made in Rich's office, was read to the jury over the objection of plaintiff's counsel. (R. 170-171).

Defense counsel invited the jury to ignore the 1983 action, to compare the two robberies, and to convict the Pawlisas of both.

Even though these issues were not properly before the court, defendant's counsel managed to transform the civil rights litigation into two full-blown criminal trials.

## D. CONCLUSION

The Seventh Circuit found it inconceivable that the boys could be unfairly prejudiced in light of the "morally reprehensible" conduct they engaged in on the night of their deaths. This statement reflects the very basic problem that the introduction of this evidence caused. The conduct of the Pawlisa brothers was not at issue. Indeed, their conduct on the night in question was freely admitted. The improper evidence of their past conduct misled the jury into ignoring the facts of the shooting itself. It is a fact that both brothers were shot in the back despite defendant's claim that Brian turned in a threatening manner. It is a fact that the pistol which Brian held in his hand was inoperable and unloaded. It is a fact that Scott was unarmed and was shot first. It is a fact that both brothers were shot within a matter of seconds of exiting the restaurant. Both fell within eighty feet of the door. It is a fact that the Pawlisas were allowed to enter the Long John Silver's despite defendant's purported belief of their violent and dangerous characters.

The jury's confusion permitted it to base its verdict on improper evidence of the characters of Scott and Brian Pawlisa. This evidence was more than prejudicial, it was unfairly so under the test laid out in *Carter v. Hewitt,* 617 F.2d 961, 972 (3rd Cir. 1980):

> [Evidence] is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case. Citing I *Weinstein's Evidence,* Section 403[03] at 403-15 to 403-17 (1978).

Furthermore, as will be discussed below, when Edmonson pulled the trigger, he was not even aware of the identities of the two people he shot and killed.

2. Cheryl Sprehe was the crew leader of the Long John Silver's restaurant on the night it was robbed. (R. 304). She was allowed to testify, over plaintiff's objection, concerning the circumstances of the robbery itself. She testified, in short, to facts that were not disputed.

Purportedly her testimony was required to corroborate Edmonson's perception of fear at the time he shot the boys. "[A]nd the fact that another person had the same perception of this fear, directly corroborates that perception." (R. 6). Further, citing to Federal Rule of Evidence 401, defendants' counsel stated, "[T]hat her testimony certainly does establish more probably than not that this was a dangerous weapon." (R. 8).

As to the argument that Sprehe's testimony fell within Rule 401's definition of relevance, the plaintiff *never* disputed that Brian's revolver could be reasonably perceived as dangerous. The police could not have known it was unloaded and nonfunctioning that night. Plaintiff's own expert said so unequivocally (Dr. George Kirkham's Deposition, page 23), as did plaintiff's counsel. (R. 299). Cheryl Sprehe's testimony on that point was wholly unnecessary since there was absolutely no dispute as to whether it was reasonable to believe the revolver was dangerous.

Even if minimally relevant, Cheryl Sprehe's testimony should properly have been excluded under Rule 403 because of its unfairly prejudicial nature. Although the Seventh Circuit asserts that she did not "break down or cry" during her testimony, it is trial counsel's very clear recollection that her testimony was emotional and she was on the verge of violating the Court's admonition. Her performance and the very nature of her testimony served to deflect the jury's attention from the real

issue. Instead, attention was focused on the details of the robbery itself, the facts of which were not disputed by plaintiff.

Defendants' counsel makes no credible argument as to why Cheryl Sprehe's testimony was necessary. The Seventh Circuit seems to suggest that the trial court's restrictions placed on her testimony were sufficient to deflect any undue prejudice it might otherwise have generated. Yet, the Seventh Circuit never addresses plaintiff's argument that her testimony is not corroborative of Edmonson's state of mind. The court never indicates whether her testimony was really relevant to begin with. Why was it necessary to elicit from Cheryl Sprehe details concerning the manner in which the robbery took place? Since defendant Edmonson could not have known what had gone on in the restaurant when he killed the brothers, what possible difference did it make to his "state of mind" that Cheryl Sprehe was scared and feared for her life?

3. The defendants' case was built around the unfairly prejudicial evidence discussed above in order to prove Edmonson's state of mind when he killed Brian and Scott Pawlisa. Defendants' counsel described that state of mind in his opening statement as follows:

> [A]t the same time the evidence will show Captain Edmonson knows that the Pawlisa boys had been involved in at least three incidents with guns, he has to make a decision, and the evidence will show that he made a decision to fire his shotgun because of his concern about the safety of his fellow officers as well as himself. (R. 36).

However, the relevance of Edmonson's state of mind depends entirely upon whether he knew that the fleeing masked figures were Brian and Scott Pawlisa at the time he pulled the trigger. Despite Edmonson's later efforts to equivocate when examined by his own counsel, it is clear from his testimony that he did not know it was the Pawlisa brothers that he had killed.

During his examination of Edmonson, plaintiff's counsel asked him three times if he knew the identities of the boys prior to the shooting. On each occasion, Edmonson flatly denied any such knowledge. In the first instance, he was asked:

Q. (By Mr. Alfeld) And when they got out of the car, would you identify, could you identify who they were?

A. No, I could not.

Q. Did Officer Simer identify them to you?

A. No.

Q. So you didn't know who they were at that time?

A. No, I didn't. (R. 136).

Next, when testifying about the masked figures who bolted from the rear door of Long John Silver's restaurant, Edmonson was asked:

Q. (By Mr. Alfeld) Do you think - could you identify them at this time?

A. No.

Q. You didn't know who they were?

A. No, I did not. (R. 151).

This critically important point was driven home in the same examination:

Q. And again, you don't know, didn't know at the time you fired those rounds who you were firing at, did you? (R. 161).

A. No, I didn't.

Defendants' counsel attempted to explain away his client's disastrous admission:

Q. (By Mr. Schmidt) At the time these two young men emerged from the back door of Long John Silver's, did you assume that one of them or both of them were the Pawlissas?

MR. ALFELD: I would object to what he assumed. He has already testified he didn't know who they were.

Q. Did you have any reason to believe, although you couldn't conclusively identify them as they came out of the back door, did you have any reason to believe who the suspects might be?

MR. ALFELD: Same objection. He has already testified he did not know who they were.

THE COURT: Objection sustained. (R. 179)

The Court's ruling went for naught. On the next day of trial, defendant Edmonson was allowed to contradict his previous testimony in response to questioning by his lawyer:

Q. (By Mr. Schmidt) Now when you fired your shotgun at that time, did you know the identity of either of those suspects?

A. (By Mr. Edmonson) That's right.

Q. And what did you know?

A. I knew that one of them was Brian Pawlisa.

MR. ALFELD: I object. His testimony was that he didn't know who either of them were.

MR. SCHMIDT: I don't believe that's correct, Your Honor.

Q. (By Mr. Schmidt) How did you know that one of them was Brian Pawlisa?

A. Brian had been identified by Officer Simer as being in the vehicle when it came on the parking lot. He had been identified as one of the persons hiding by the trailer and going into the building, the small building behind Long John Silver's. (R. 277).

It is clear that Edmonson did not know the identities of the two boys he shot and killed. Therefore, what he purportedly knew about the Pawlisa brothers was irrelevant to his state of mind at the time the shots were fired.

4. At the conclusion of defendants' case, plaintiff moved for a directed verdict against Edmonson as to Scott Pawlisa on the issue of liability. (R. 309-310). Plaintiff's motion was based upon Edmonson's testimony that he had not aimed his shotgun at Scott nor had he realized at the time that he had in fact shot the boy. (R. 156). Edmonson's testimony proves that he was, at the very least, negligent in killing Scott Pawlisa. Such an admission on his part "so overwhelmingly favors [plaintiff] that no contrary verdict based on that evidence could ever stand." *Moran v. Raymond Corp.*, 484 f.2d 1008, 1014 (7th Cir. 1973). This Court has on several occasions refused to state whether simple negligence is sufficient for recovery under Section 1983. However, this Court acknowledges that "[n]othing in the language of Section 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Parratt v. Taylor,* 451 U.S. 527, 534 (1981).

The Seventh Circuit does not reach the question whether negligence is sufficient for Section 1983 liability. That court found that "there was sufficient evidence to warrant submitting to the jury the question whether Edmonson acted as a reasonably careful person would have acted under similar circumstances when he shot Scott Pawlisa." The Court suggests that it is not negligence per se if a police officer unintentionally shoots an unarmed person fleeing from a crime scene.

Even though this Court has yet to hold that mere negligence is sufficient to sustain a finding of liability under Section 1983, Petitioner strongly urges that the facts of the case at bar demand such a ruling. To permit the admittedly unintentional killing of an unarmed 18-year-old boy to go unredressed merely because there has not yet been a definitive ruling on the negligence issue would do great disservice to the constitutional principles that Section 1983 was enacted to safeguard.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 81-5355

Sara Crawford, Special
Administrator
Plaintiff

v.

Jerry Edmonson, et al.
Defendant

## ORDER

(Filed - July 20, 1984)

THIS MATTER comes on for hearing this 20th day of July 1984, on Plaintiffs MOTION FOR NEW TRIAL, and the Court having heard arguments of counsel.

IT IS ORDERED that plaintiffs motion for a new trial is DENIED.

Date: July 20, 1984

/s/ W. J. Beatty
Judge

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 84-2371

SARA L. CRAWFORD, Special Administrator of the Estate of SCOTT W. PAWLISA, Deceased, and BRIAN PAWLISA, Deceased, as Administrator,
*Plaintiff-Appellant,*

*v.*

JERRY EDMONSON, Individually and as a Police Officer of the City of Centralia; KERMIT JUSTICE, Individually and as Chief of Police of the City of Centralia, and the CITY OF CENTRALIA, a municipal corporation,
*Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Illinois.
No. 81-5355—William L. Beatty, *Judge.*

ARGUED APRIL 12, 1985—DECIDED JUNE 13, 1985

Before CUMMINGS, *Chief Judge*, POSNER and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff-appellant Sara Crawford appeals from the district court's denial of her motion for a new trial following a jury verdict in favor of defendants-appellees on the section 1983 claim that she brought as Special Administrator of the estates of her two deceased sons, Brian and Scott Pawlisa. Her suit alleged that the defendants violated the civil rights of Brian and Scott Pawlisa when defendant Jerry Edmonson, a police officer for the city of Centralia, shot and killed the two boys as they fled the scene of an armed robbery.

The issues on appeal are (1) whether the trial court abused its discretion in admitting evidence of Brian and Scott Pawlisa's prior misconduct involving the use of guns for the purpose of demonstrating Captain Edmonson's reasonable perception that the boys posed a threat to him and his fellow officers, (2) whether the trial court abused its discretion in allowing the testimony of Cheryl Sprehe, an employee of the store that was robbed, and (3) whether the trial court erred in denying plaintiff's motion for a directed verdict on liability in the shooting of Scott Pawlisa. We find no error on the part of the trial court and accordingly affirm the court's entry of judgment on the jury verdict.

I.

On the night of Friday, December 21, 1979, Brian and Scott Pawlisa robbed a Long John Silver's restaurant in Centralia, Illinois. The Centralia police had staked out the restaurant that night, acting on a tip from the police chief of a neighboring community that the Long John Silver's would be robbed either Friday or Saturday night, that one of the restaurant employees would aid the robbery attempt, that it would be an armed robbery, and that one or both of the Pawlisas would be involved. The five officers participating in the stake-out (defendants Edmonson and Justice, Detectives Simer and Shaw, and Captain Qualls) had positioned themselves around the restaurant by approximately 9:15 p.m.

Between 9:30 and 10:00 p.m., the officers observed a white Chevy slowly circling the Long John Silver's. Detective Simer, who had a pair of binoculars that evening, testified that he recognized one of the car's occupants as Brian Pawlisa and informed the other officers of that fact by police radio. Shortly after 10:00 p.m., two individuals were seen leaving the car immediately behind the Long John Silver's, running across an open field, and hiding underneath a trailer in a private yard. Detective Simer testified that he identified Brian Pawlisa as one of

the boys getting out of the car, and believed that he so stated over the police radio. Although Captain Edmonson testified that he was not able to identify the two suspects himself, he later testified that he knew based on Simer's identification that one of the two suspects was Brian Pawlisa.

After the boys ran and hid under the trailer, they were under constant surveillance for the next fifty or so minutes. During that time, an employee emerged from the restaurant to take out the trash and talked to the suspects across the field for a few minutes. The suspects then ran from the trailer to a shed behind the Long John Silver's. Soon thereafter, the same employee came out to the shed to speak with them again. Up to this point, no gun had been conclusively identified and all officers agreed that they had no probable cause to make an arrest. The suspects then emerged from the shed with masks over their faces. One was seen carrying a gun. Although probable cause was finally established at that point, the officers testified that they did not have enough time to get themselves in position to make a safe arrest before the suspects ran along the west side of the building and entered the Long John Silver's through the front door.

After the two suspects entered the Long John Silver's, Captain Edmonson and Detectives Simer and Shaw took positions around the back of the restaurant. The officers were partially hidden behind cars, a garbage bin, the shed, and a telephone pole. Captain Qualls took a position in front and to the side of the restaurant in the adjacent open field near a "For Sale" sign.[1] All four officers were armed with their service revolvers and 12-gauge shotguns.

When the two suspects emerged from the rear door of the restaurant a few minutes later, one carrying a gun, they immediately started running toward the open field.

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[1] Chief of Police Kermit Justice had left the scene to follow the white Chevy.

Simer, Edmonson, and Shaw all testified that they shouted "Halt, police," at least three times before any shots were fired. Edmonson then fired a shot into the air, but the boys continued running. By this time Captain Qualls could see them running from behind the building and he too shouted "Halt, police." The officers testified that the first suspect, the one with the gun, then started to turn to his left toward Detective Shaw's position behind the telephone pole. Edmonson then fired two shots, both aimed at the figure in front with the gun (later identified as Brian Pawlisa). Edmonson's first shot struck both boys, and the second hit only Brian. Scott Pawlisa, who was 18 years old, was hit in the back by five pellets of 00-buckshot and died within an hour. Brian, who was 17 years old, was struck by six pellets in his back and died of his wounds some twenty hours later. All four officers testified that when Edmonson fired the fatal shots, they were in fear for their lives. Detective Shaw had already attempted to fire, but his gun was apparently not loaded. Detective Simer and Captain Qualls both testified that they were about to fire and would have if Edmonson had not.

The deceased boys' mother, plaintiff-appellant Crawford, filed this action as their special administrator in December 1981, alleging a violation of her sons' civil rights under 42 U.S.C. § 1983 (1982) and seeking recovery under the Illinois Wrongful Death and Survival Acts for the defendants' negligence. The case was tried in November 1983 but ended in a hung jury, 5-1 in the defendants' favor. When the case was retried in June of 1984, Crawford dropped the negligence claims and proceeded solely on the section 1983 claim. The defense argued, as it had in the first trial, that Captain Edmonson shot Brian and Scott Pawlisa in good faith and with legal justification based upon the Illinois deadly force statute, which provides that a police officer may use force likely to cause death or great bodily harm

> only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or [another] person, or when he reasonably believes both that:

> (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

Ill. Rev. Stat. ch. 38, § 7-5(a) (1984).[2] A copy of this statute was posted on the bulletin board in the Centralia police station, and was known to Captain Edmonson at the time of the shooting. The jury in the second trial deliberated for forty minutes before returning a verdict for the defendants. The trial court subsequently denied Crawford's motion for a new trial and entered final judgment on the verdict. This appeal followed.

## II.

### A. Admission of Evidence of Prior Misconduct

Crawford argues that the trial court erred in allowing the admission of evidence of Brian and Scott Pawlisa's prior involvement in three incidents involving the use of guns. She argues that the evidence was of no probative value, was unfairly prejudicial to her case, and served only to put the boys on trial posthumously for their past crimes. The defendants maintain that the contested evidence was relevant to Captain Edmonson's reasonable belief, at the time he pulled the trigger, that deadly force was necessary to prevent death or serious injury to himself or the

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[2] Under *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), in which the Supreme Court held that Tennessee's deadly force statute was unconstitutional insofar as it authorized the use of deadly force in that case, *id.* at 1701, the Illinois statute seems to pass constitutional muster. *See id.* at 1704 & n.18 (listing Illinois as one of 18 states allowing the use of deadly force only in circumstances deemed appropriate at page 1701 of the Court's opinion).

other officers. They further argue that the evidence was not unduly prejudicial when compared to the boys' admitted armed robbery of the Long John Silver's that very night.

Prior to trial, Crawford filed a motion *in limine* to preclude the defendants from making any mention of Brian or Scott Pawlisa's prior juvenile and/or criminal records or of their supposed involvement in the armed robbery of a Hardee's restaurant three months before their death. The trial judge ruled that testimony on the Hardee's incident would be allowed as well as testimony about two other specific acts of misconduct involving guns. He disallowed any mention of prior acts of misconduct that did not involve the use of guns.

The first incident described to the jury was a cross-burning with which the boys were involved in May 1979. The incident was investigated by Lieutenant Upchurch, Centralia's juvenile officer, who reported directly to Captain Edmonson. Edmonson testified that the Pawlisas and some of their friends had built a cross, wrapped it with some rags, doused it with a flammable liquid, put it on a street corner in a predominately black community in Centralia, and set it afire. One of the boys who had allegedly participated in the cross-burning told the police that a .44 Magnum pistol had been obtained from the Pawlisas' father and had been shot into the air six times during the cross-burning. He also said that the boys had gone back to a house in the white part of town to lay in wait with guns for the blacks to come and retaliate. Although Brian Pawlisa was charged with disorderly conduct as a result of the incident, no weapons charges were filed against any of the boys involved. Crawford asserts that since no weapons charges were filed, no shots were ever fired. She therefore argues that the cross-burning incident, which her brief quite inappropriately describes as "little more than a juvenile prank," had no probative value as to the reasonableness of Edmonson's belief over six months later that the Pawlisas would be likely to use a gun against him or the other officers.

The second incident referred to at trial was the accidental shooting of Jimmy Collins, a friend of Brian and Scott Pawlisa's. Edmonson testified that several boys, including the Pawlisas, were playing around with a gun when it went off and shot Collins in the leg. Edmonson further testified, however, that it was Jimmy Collins who was holding the gun when it went off, and that the Pawlisas were merely present when the accident occurred. There was no evidence that the gun belonged to either of the Pawlisas.

The third incident related to the jury was the armed robbery of a Hardee's restaurant in Centralia on September 28, 1979. Captain Edmonson was one of the two officers investigating that robbery. He testified that a shot had been fired inside the building in the course of the robbery, that the robbers had told the employees that they would blow their heads off, and that they had pushed one of the employees around. Edmonson further testified that the Pawlisas had been suspects in that robbery based on information received the day after the robbery from Mr. Richard Rich, the Dean of Students at Centralia High School. Rich had previously given information to the police department on numerous occasions, and was considered a reliable source. Rich informed Edmonson and Detective Simer, during an interview in Rich's office, that some students had told him that Brian Pawlisa's girlfriend had been bragging around school about her boyfriend's involvement in the Hardee's robbery the night before. The notes that Edmonson made at Rich's office that day bore the names of five persons, including Brian and Scott Pawlisa. Next to each of the Pawlisas' names was the notation "gun." Edmonson's investigation into the Hardee's robbery did not result in any charges being brought against the Pawlisas or anyone else prior to the boys' death nearly three months later.

The scope of our review of evidentiary questions such as those presented in this case is extremely narrow. The Federal Rules of Evidence allow the admission of any relevant evidence except as otherwise provided by the

Constitution, Acts of Congress, or the Rules. Fed. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Fed. R. Evid. 403. Since most evidence presented by one party in litigation will presumably be prejudicial to the other, in the sense that it favors the party introducing it and damages the opposing party's case, Rule 403 requires that the evidence sought to be excluded threaten *unfair* prejudice. *United States v. Medina*, 755 F.2d 1269, 1274 (7th Cir. 1985); *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980). Unfair prejudice is the "likelihood that the evidence will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented on the crime charged . . . ." *Medina*, 755 F.2d at 1274. *See also* Fed. R. Evid. 403 advisory committee note. In this case, for example, the contested evidence would cause unfair prejudice to Crawford if it induced the jury to decide for the defendants because the Pawlisas were bad boys who deserved what they got rather than upon a determination that Edmonson was legally justified in shooting them.

Once it is determined that evidence has probative value but creates a danger of unfair prejudice, the trial judge must find that the danger of undue prejudice *substantially* outweighs the probative value of the evidence before its exclusion will be warranted under Rule 403. *Medina*, 755 F.2d at 1274. The trial court's balancing of unfair prejudice and probative value is completely within its discretion, and its decision on admissibility must be accorded "great deference." *Id.*

The trial judge in this case decided before trial to allow testimony on the three specific incidents described above. In so doing, the court determined that the danger of unfair prejudice from this testimony did not substantially outweigh its probative value. Because the relevant

issue was whether Captain Edmonson reasonably believed that the Pawlisas would use the gun that Brian was carrying as they ran out of the Long John Silver's against Edmonson or his fellow officers, the trial court excluded any reference to prior misconduct of the boys that did not involve the use of guns.

Crawford correctly observes that Captain Edmonson's testimony on these three incidents was not the best evidence of whether they actually occurred, since his was often second- or third-hand knowledge of the incidents in question. Yet the issue was not whether the incidents actually occurred, but rather the extent of Edmonson's knowledge of those incidents at the time he shot the Pawlisas. Thus, it would not have been proper for Lieutenant Upchurch, whose state of mind was not at issue, to testify about the cross-burning even though he had more complete knowledge of the incident from his direct investigation. Instead, Captain Edmonson testified as to his *own* knowledge of the incident, based largely on Lieutenant Upchurch's reports. Only the latter testimony had any probative value concerning the issue before the jury, and only the latter was put into evidence. The jury was capable of weighing the hearsay quality of Edmonson's information when determining whether it was reasonable for him to believe, on the basis of that information, that the Pawlisas would be likely to use the gun that Brian was carrying that night.

Beginning with the probative value of the three incidents reported, we agree with the trial court that both the cross-burning incident (at which Edmonson could reasonably have believed shots were fired) and the Hardee's armed robbery had probative value regarding Edmonson's belief that the Pawlisas could and would fire at the officers stationed outside the Long John Silver's.[3]

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[3] Crawford argues that evidence of the Pawlisas' prior misconduct had absolutely no probative value because Captain

(Footnote continued on following page)

The accident involving Jimmy Collins, however, had little or no probative value on that issue because Edmonson knew that Collins had shot himself and that the Pawlisas were only standing nearby. The accidental shooting therefore had little or no bearing on the likelihood that the Pawlisas would themselves fire a weapon.

Turning to the danger of unfair prejudice, it seems clear that the testimony on the cross-burning and the armed robbery of the Hardee's created the possibility that the jury would decide the case on improper grounds. The danger of undue prejudice stemming from these two incidents must be viewed, however, in light of the undisputed evidence that the Pawlisas had robbed the Long John Silver's at gunpoint that very evening. We believe that a jury would not find the two prior acts of misconduct more morally reprehensible than the Long John Silver's robbery, nor would it find the number of incidents involved unduly suggestive of a two-person "crime wave" justifiably brought to an end. With regard to Jimmy Collins's accidental shooting, although we have said that the incident had little or no probative value, we also believe that it caused little or no danger of unfair prejudice. The Pawlisas' mere presence when Collins accidentally shot himself was just not the sort of "misconduct" likely to induce the jury to decide that the boys "deserved" what they got. Although, in such circumstances, we would have preferred to see the evidence excluded, we cannot say

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[1] *continued*

Edmonson did not know that the two boys running out of the Long John Silver's were the Pawlisas. Edmonson testified several times at trial that he did not know at whom he was firing. Other testimony indicates, however, that he knew that one of the boys had been identified as Brian Pawlisa but just did not know which one was Brian at the time they ran out of the restaurant, at night, with their masks on. We hold that the question whether Edmonson reasonably believed at the time he fired that one of the suspects was Brian Pawlisa was a factual question, and that there was sufficient evidence to support the jury's conclusion that he did.

that the trial court abused its considerable discretion in admitting it.

All things considered, we believe that the trial court did not abuse its discretion in determining that the probative value of these prior acts of misconduct was not substantially outweighed by the danger of unfair prejudice. We therefore affirm the trial court's admission of the evidence.

### B. Admission of Testimony of Cheryl Sprehe

Crawford next contends that the trial court abused its discretion by denying her pre-trial motion to exclude the testimony of Cheryl Sprehe, who was the crew leader of the Long John Silver's restaurant on the night of the robbery. Sprehe was permitted to testify as to some of the circumstances of the robbery itself, even though they were not in dispute, in order to corroborate Edmonson's perception of fear at the time he shot the boys. Crawford alleges that the prejudicial effect of Sprehe's testimony substantially outweighed its probative value.

Crawford's allegation in her pre-trial motion that Sprehe's testimony would be unfairly prejudicial was based primarily on Sprehe's conduct during the first trial. In that proceeding, Sprehe "literally came unglued on the witness stand," in the words of the trial court, began crying, and gave a very graphic description of what had happened to her that night. She testified that she was seven or eight months pregnant at the time of the robbery, that she was terrorized by the two men, and that they had held a gun to her head, had made her get down on the floor, and had taped her hands and feet with duct tape. Although the trial judge denied Crawford's motion to exclude Sprehe from testifying altogether in the second trial, he made every attempt to ensure that Sprehe's emotional performance in the first trial would not be repeated. The judge ruled before trial that testimony as to her pregnancy, being put on the floor, having a gun held to her head, and being taped would *not* be allowed in

the second trial. The court further instructed defendants' counsel as follows:

> I want you to caution this young woman very carefully about the limits that I have placed on her testimony. Hopefully she has been through this once and she will be a little more composed this time, but I want you to caution her about that too.

Tr. 9. Cheryl Sprehe's testimony in the second trial lasted only a few minutes. She testified that two men came in wearing stocking masks, that they pointed a gun at her, and that they asked for all of the money. She further testified, by "yes" or "no" answers to counsel's questions, that she believed it was a real robbery, that she believed the two men were serious, and that she was in fear for her life. At no time during her brief testimony did she break down or cry.

We hold that the trial court did not abuse its discretion in allowing Cheryl Sprehe to testify. The trial judge acted within his discretion in deciding that any unfair prejudice due to Sprehe's testimony, which was largely deflected by the trial judge's careful instructions to counsel prior to trial, did not so substantially outweigh the probative corroborative value of her testimony as to justify its exclusion.

### C. Directed Verdict as to Scott Pawlisa

Crawford lastly argues that the trial court erred in denying her motion for a directed verdict against Captain Edmonson on the issue of liability in the shooting of Scott Pawlisa. She asserts that Edmonson negligently deprived Scott of his constitutional rights by accidentally shooting him while attempting to shoot Brian. Edmonson admitted at trial that he was only aiming at Brian Pawlisa, who was carrying the gun, and did not intend to shoot Scott Pawlisa, who was unarmed.

The underlying premise of Crawford's negligent deprivation claim is that simple negligence is generally

sufficient to establish liability under section 1983. This is not, however, entirely true. The Supreme Court held in *Parratt v. Taylor*, 451 U.S. 527 (1981), that a plaintiff must establish two essential elements in order to recover under section 1983: (1) that the defendant acted under color of state law, and (2) that the defendant's conduct "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 535. If these two elements are established, section 1983 allows recovery even if the defendant's conduct was merely negligent rather than intentional. *Id.* at 534-35. *Parratt* therefore stands for the proposition that section 1983 imposes no independent state of mind requirement, and thus that simple negligence *may* be sufficient to establish liability under section 1983. Whether negligent conduct will sustain section 1983 liability in a given case depends upon the particular constitutional provision at issue. *See id.* at 547-48 (Powell, J., concurring) (question of whether intent is necessary to establish liability cannot be given uniform answer across broad spectrum of constitutional violations); *Baker v. McCollan*, 443 U.S. 137, 140 n.1 (1979) (apart from the issue of whether section 1983 contains its own state of mind requirement, the defendant's state of mind may be relevant on the issue of whether a constitutional violation has occurred in the first place). *See also State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir.) (even though section 1983 embodies no state of mind requirement, the Eighth Amendment does), *cert. denied*, 104 S. Ct. 491 (1983). For example, Crawford's complaint alleged violations of her sons' First, Fourth, Fifth, Eighth, and Fourteenth Amendment (including due process and equal protection) rights. Yet negligence would not be sufficient, even if proven, to establish a violation under either the Eighth Amendment, *see Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (requiring "deliberate indifference"); *State Bank of St. Charles v. Camic*, 712 F.2d at 1145-46 ("deliberate or callous indifference"), or the Equal Protection Clause of the Fourteenth Amendment, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (requiring

discriminatory intent or purpose). Thus, simple negligence will not in every instance suffice to establish a constitutional violation under section 1983.

Because negligent conduct is the absolute minimum that must be shown to establish a violation of any constitutional right, however, we would not reach the question of whether negligence would be sufficient to maintain section 1983 liability in this case if the jury properly found that Edmonson was not negligent in shooting Scott Pawlisa. Crawford's only argument on appeal is that the trial court erred in submitting the issue to the jury in the first place.

Our standard for reviewing the trial court's denial of Crawford's motion for a directed verdict on this issue is whether, viewing all of the evidence in the light most favorable to the defendants, there was sufficient evidence to warrant submitting to the jury the question whether Edmonson acted as a reasonably careful person would have acted under similar circumstances when he shot Scott Pawlisa. *See Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 287-88 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971). The mere fact that Captain Edmonson did not intend to shoot Scott Pawlisa does not conclusively establish that he acted unreasonably or negligently under the circumstances of that evening. Whether it is negligent for someone to shoot at one person and accidentally hit another standing nearby depends on many factors, as this case well illustrates.

Edmonson testified that he shot at Brian Pawlisa because he believed that Brian was turning around to shoot at Edmonson or his fellow officers. He also testified that he was concerned for the safety of some youths from the local school who had gathered behind the police officers to watch the "excitement," apparently tipped off in advance that the robbery would take place. Another officer testified that the Pawlisas were running across the open field toward a residential community. In sum,

Edmonson shot at Brian Pawlisa in order to prevent perceived serious harm to himself, his fellow officers, and other members of the community. The only person near enough to Brian to be accidentally hit was Scott Pawlisa, who was not an innocent bystander but rather a person just as guilty of armed robbery under Illinois law as was his brother Brian. While this does not mean that Edmonson was entitled to disregard the possibility that Scott would be injured by the shots intended for Brian, it does differentiate this case somewhat from the situation that would have been present if Edmonson's conduct had endangered the life of a completely innocent passerby. Lastly, there was evidence that Edmonson and the three other officers yelled "Halt, police" numerous times before firing any shots. Edmonson fired a warning shot into the air before finally taking aim at Brian Pawlisa. Viewing all of this evidence in the light most favorable to Edmonson, we conclude that there was sufficient evidence that Edmonson did what a reasonably careful person would have done under the circumstances to warrant submitting the question to the jury. The trial court accordingly did not err in denying Crawford's motion for a directed verdict against Edmonson on the issue of his liability in the shooting of Scott Pawlisa.

III.

In conclusion, the district court's entry of judgment for the defendants is AFFIRMED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

Supreme Court, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-418

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SARA CRAWFORD, Special Administrator of the Estates of SCOTT W. PAWLISA, Deceased and BRIAN PAWLISA, Deceased, as Administrator,

*Petitioner,*

vs.

JERRY EDMONSON, Individually and as a Police Officer of the City of Centralia; KERMIT JUSTICE, Individually and as Chief of Police of the City of Centralia; and CITY OF CENTRALIA, a Municipal Corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the trial court abuse its discretion by admitting evidence of certain prior criminal acts alleged to have been committed by Petitioner's decedents, Brian Pawlisa and Scott Pawlisa?

2. Did the trial court abuse its discretion in admitting evidence that corroborated Respondent Edmonson's state of mind?

3. Did the trial court abuse its discretion by permitting the testimony of Cheryl Sprehe concerning the details of the armed robbery committed by decedents immediately prior to their respective deaths?

4. Did the trial court err in denying Petitioner's motion for a directed verdict on the issue of liability against Respondent Edmonson as to decedent Scott Pawlisa?

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari (hereinafter Petition) to the Court of Appeals for the Seventh Circuit.

## OPINION OF THE COURTS BELOW

The District Court did not enter an opinion in this cause. The opinion of the Court of Appeals for the Seventh Circuit is published in the official reporter. *Crawford v. Edmonson, et al,* 764 F.2d 479 (7th Cir. 1985).

## JURISDICTIONAL STATEMENT

In a trial before the Honorable William L. Beatty, United States District Judge, in the Southern District of Illinois, a jury returned a verdict in favor of all Respondents on June 14, 1984. The District Court entered judgment on the verdict. On July 20, 1984, the District Court denied Petitioner's motion for a new trial. Petitioner appealed the cause, and, on June 13, 1985, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. *Crawford v. Edmonson, et al,* 764 F.2d 479 (7th Cir. 1985). Jurisdiction lies in this Honorable Court pursuant to Title 28 United States Code, Section 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES AT ISSUE

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FEDERAL RULES OF EVIDENCE

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ILLINOIS REVISED STATUTES

Chapter 38, Section 5-2, When Accountability Exists

A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commision of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense is so defined that his conduct was inevitably incident to its commission; or

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such com-

mission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Chapter 38, Section 7-5(a)

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

## STATEMENT OF FACTS

On Friday night, December 21, 1979, Brian and Scott Pawlisa robbed a Long John Silver's Restaurant in Centralia, Illinois. The day before the robbery, an informant, Dr. Collins, told the Chief of Police of neighboring Central City that either or both of the Pawlisas would rob the restaurant on Friday or Saturday night and that the robbery would be an armed robbery. (R.213).

The Central City Chief of Police notified Respondent Kermit Justice, the Centralia Chief of Police, of this information. Respondent Justice arranged to stake out the restaurant. Respondent Edmonson was one of four other officers involved in the stake out that evening. (R.98)

Between 9:30 and 10:00 p.m., the officers observed a white Chevrolet slowly circling the restaurant. (R.134). Detective Simer, who had a pair of binoculars that evening, testified that he recognized one of the car's occupants as Brian Pawlisa, and he informed the other officers of that fact by police radio. (R.222, 239). Shortly after 10:00 p.m., police saw two of the occupants leaving the car immediately behind the restaurant, running across an open field, and hiding underneath a trailer in a private yard. (R.239). Twice, an employee of the restaurant emerged from the building, ostensibly to take out the trash, and talked with the suspects. The suspects thereafter ran from the trailer to a shed behind the restaurant. (R.139). Up to this point, Officers had not verified that the suspects possessed a gun, and all of the officers agreed that they had no probable cause to make an arrest. The suspects then emerged from the shed, wearing masks over their faces. (R.145). At this time, one was seen carrying a gun. Although probable cause was finally established at that point, the officers testified that they did not have enough time to get in position to make a safe arrest before the suspects ran along the side of the building and entered the restaurant through the front door. (R. 145, 146, 177, 178).

Cheryl Sprehe was working inside Long John Silver's as the crew leader. She testified that the two suspects entered with stocking masks over their heads, one armed with a gun. (R.304). They demanded money, and she gave it to them. She testified at trial that the gun was real, that the robbery was real, and that she was in fear for her life. (R.305).

The suspects emerged from the rear door of the restaurant. (R.288). By this time, the officers had taken up positions around the rear of the restaurant. All four officers were armed

with standard police shotguns and service revolvers. The suspects immedicately ran toward the open field behind the restaurant. Officers Edmonson, Simer, and Shaw called out "halt, police," but the suspects continued to run, the first carrying the gun. (R. 180, 289). Captain Edmonson fired a shot into the air, but the suspects continued to run. Again, the officers called out "halt, police," but were ignored. The first masked suspect started to turn, gun in hand, toward the position of Officer Shaw. At that time, Captain Edmonson fired twice at the first suspect, the first shot hitting both the suspects. (R.291). Five pellets of shot hit Scott Pawlisa, who died within an hour. Six pettets hit Brian Pawlisa, who died of his wounds approximately 20 hours later. All four officers testified that when Captain Edmonson fired the fatal shots, they were in fear for their lives. (R.182, 293). Detective Shaw had already attempted to fire, but his gun was apparently not loaded. Detective Simer and Captain Qualls both testified that they were about to fire and would have had Edmonson not fired. (R.293).

The decedents' mother, Petitioner Crawford, filed this cause of action as their special administrator in December 1981, alleging a violation of her sons' civil rights under Title 42, United States Code, Section 1983 and seeking recovery under the Illinois Wrongful Death and Survival Acts for the Respondents' negligence. The case was tried in November 1983, ending in a jury hung five to one in the Respondents' favor. When the case was retried in June 1984, Petitioner dropped the negligence claim and proceeded only on the civil rights claim. The defense argued, as it had in the first trial, that Captain Edmonson shot Brian and Scott Pawlisa in good faith and with legal justification based upon the Illinois Deadly Force Statute. Captain Edmonson knew both Brian Pawlisa and Scott Pawlisa before their deaths. Prior to trial, Petitioner presented a motion in limine to preclude evidence of other incidents of unlawful conduct by the decedents. The Court granted the motion in part and denied the motion in part, allowing in only evidence of those incidents involving guns.

The jury first learned about the decedents' prior activities with guns from Petitioner's counsel. In his opening statement, Petitioner's counsel discussed the cross burning incident, noting that the Pawlisas allegedly erected and burned a cross in the black community in Centralia and that guns were involved in the incident. (R.13). Petitioner's counsel then told the jury about testimony they would hear that the Pawlisas were present when Jimmy Collins, informant Dr. Collins' son, was shot in the leg. (R.13). Counsel proceeded to tell the jury they would hear testimony about the Pawlisas being suspects in an armed robbery at another fast-food restaurant in Centralia several months before, when a gun was fired. (R.14). Petitioner's direct examination of Chief Kermit Justice established the first evidence of the Pawlisas' criminal history and potential for violence. (R. 80-81). Petitioner's counsel questioned Captain Jerry Edmonson on direct examination about the cross-burning incident (R.124), the shooting of Jimmy Collins (R. 124), and the prior fast-food restaurant robbery. (R.125-129). During Respondent's examination, Captain Edmonson testified that he was aware of this information at the time of the Long John Silver's robbery. (R. 166, 171, 183).

## JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the cause laid in the United States District Court for the Southern District of Illinois, pursuant to Title 28, United States Code, Sections 1331 and 1343, and Title 42, United States Code, Sections 1983, 1985(2) and (3), 1986, and 1988. The appeal from the District Court properly laid in the United States Court of Appeals for the Seventh Circuit, pursuant to Title 28, United States Code, Section 1291.

## ARGUMENT

### I.

**The Trial Court Did Not Abuse Its Discretion By Admitting Evidence Of Certain Prior Criminal Acts Alleged To Have Been Committed By Petitioner's Decedents, Brian Pawlisa And Scott Pawlisa.**

### II.

**The Trial Court Did Not Abuse Its Discretion In Admitting Evidence That Corroborated Respondent Edmonson's State Of Mind.**

Petitioner appeals the admission into evidence of testimony concerning three prior incidents in which Brian and Scott Pawlisa used firearms. The trial court denied Petitioner's motion in limine to keep out such testimony; paradoxically, the jury first heard of each of the incidents during Petitioner's opening statement and then again during Petitioner's direct examination of Captain Edmonson and Police Chief Justice. Petitioner also elicited testimony of the juveniles' violent past from their father, James Pawlisa. During Petitioner's direct examination of Chief Justice, Petitioner elicited the following testimony:

Q. Now Chief, did you believe Brian Pawlisa was a dangerous young man?

A. We had information to the effect that they had been involved in other things, weapons had been involved, yes, sir.

Q. Did you believe that he was a dangerous young man?

A. I believed that the information we had was correct, yes, sir.

Q. So you did believe that he was dangerous?

A. Well, anyone that has weapons and has a history of that, yes, sir, I would have to consider dangerous.

Q. And you also believed that his brother Scott was dangerous?

A. Again, they had the history of weapons, yes.

Q. And you believed that, and it was your opinion that those were boys who were violent criminal types, is that right?

A. Well, I don't know about the word violent, but they had potential, anyone that has weapons has potential of being violent.

Q. And do you recall in a previous deposition the question was asked, in your opinion were those boys violent criminal types and your answer was yes, sir?

A. That would be correct, that's my answer, yes.

Q. And is it also your opinion that these were two boys that would kill, is that right?

A. The potential is there, if they use weapons, yes.

Q. So you did believe that these were two boys that would kill?

A. If gotten in the right position, yes sir.

(R. 80-81)

Accordingly, any objection Petitioner may have had is now waived. *United States v. Johnson,* 720 F.2d 519 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1310, 79 L.Ed.2d 707 (1984).

Nevertheless, Respondents proceed to address the issues raised. At the outset, Respondents note that Petitioner's first and second questions for review must be considered together. Peti-

tioner's first question for review challenges generally the admission of the three prior incidents under Federal Rules of Evidence 401, 403, and 404[1]; Petitioner's second question for review specifically challenges the admission of the same testimony as improper to corroborate Respondent Edmonson's state of mind. Petitioner's bifurcated argument obscures the focal point of the analysis. Testimony concerning the three incidents was relevant, pursuant to Federal Rule of Evidence 401, and more probative than prejudicial, pursuant to Federal Rule of Evidence 403, precisely because it corroborated Respondent Edmonson's state of mind, which was a critical element of the defense. Thus, the first and second questions for review are inextricably connected.

There was in force in the State of Illinois at the time of the occurrence a statute providing that a police officer may use deadly force only when necessary to prevent death or great bodily harm to himself or another person, or when he reasonably believes both that such force is necessary to prevent an arrestee from escaping and that the arrestee has committed a forcible felony or is attempting to escape by using a deadly weapon, or when the felon indicates that he will endanger human life or inflict great bodily harm unless arrested without delay. *Illinois Revised Statutes,* Chapter 38, Section 7-5(a). At all times, Captain Edmonson's defense was that he was relying upon the Use of Force Statute in good faith. *See, Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). This Honorable Court

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[1] Petitioner presents a contradictory argument: On the one hand, Petitioner argues that the prior incident testimony was inadmissable pursuant to Federal Rules of Evidence 401 and 403. On the other hand, Petitioner argues that the evidence was inadmissable because Federal Rule of Evidence 404 does not properly apply to civil proceedings. However, the evidence at issue was not offered under Federal Rule of Evidence 404. Thus, the applicability of Federal Rule of Evidence 404 in a civil proceeding is not properly before this Honorable Court. Moreover, federal courts commonly follow Federal Rules of Evidence 401 and 403 civil cases.

adverted to the constitutional validity of this Illinois statute in *Tennessee v. Garner,* ____ U.S. ____, 53 U.S.L.W. 4410, 4414 n. 18 (March 26, 1985). Indeed, the case at bar is identical to circumstances to which this Honorable Court therein referred with approval.

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (53 U.S.L.W., at 4412-13.)

Pursuant to Federal Rule of Evidence 403, the prior incident testimony was relevant to prove Respondent Edmonson's state of mind at the time of the robbery. *Nicholson v. Layton,* 747 F.2d 1225 (8th Cir. 1984); *MCI Communications Corporation v. American Telephone and Telegraph Company,* 708 F.2d 1081 (7th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 234 (1983); *Forro Precision, Inc. v. International Business Machines Corp.,* 673 F.2d 1045 (9th Cir. 1982); *Bowden v. McKenna,* 600 F.2d 282 (1st Cir. 1979).

When Captain Edmonson fired his shotgun, he reasonably believed such force was necessary to prevent great bodily injury to himself or others. To prove the reasonability of his belief, Respondents offered not only evidence of Edmonson's perceptions at the time he fired his shotgun, but also Edmonson's knowledge of the Pawlisas' prior criminal activities involving firearms. This evidence was certainly relevant in proving Edmonson reasonably believed that he and others might be shot by Brian Pawlisa as the juvenile turned, armed with a .44 caliber revolver.

Petitioner also argues in error that the prior incident testimony was more prejudicial than probative. Petitioner would have this Honorable Court believe that the evidence created a wrong impression about the Pawlisa brothers. Yet the crime they had just committed that night was certainly no less serious than the prior incidents. Indeed, Petitioner admits her sons committed the armed robbery that night. Federal Rule of Evidence 403 insulates not against evidence that is merely prejudicial but against evidence that is unfairly prejudicial. *Carter v. Hewitt,* 617 F.2d 961 (3d Cir. 1980). Evidence is unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one." Advisory Committee Note, F.R. Evid. 403. Nowhere has Petitioner identified an undue inference from the testimony, for none exists. Although Captain Edmonson's testimony may not have been the best evidence of whether the incidents actually occurred, the issue was not whether the prior incidents actually occurred but the extent of Captain Edmonson's knowledge at the time he shot the Pawlisas.

Petitioner attempts to raise the issue of Captain Edmonson's identification of Brian Pawlisa into a question of constitutional magnitude. Evidence adduced at trial established that, when the two juveniles got out of the white Chevrolet, Officer Simer announced on the police radio that one of the two youths was Brian Pawlisa. Captain Edmonson heard Officer Simer broadcast this information and maintained visual surveillance of the two youths. As the masked juveniles ran from the restaurant, Captain Edmonson knew that one of the two was Brian Pawlisa. In any event, the adequacy and reasonability of identification was a question for the jury to weigh.

Although Petitioner asserts in her Petition at page 8 that the prior incident testimony "did not prove that Edmonson's 'perception of fear was legitimate,' " the triers of fact decided to the contrary. Likewise, Petitioner's arguments that the Pawlisas were never charged in either the Jimmy Collins

shooting or the cross-burning incident and that Respondents did not prove the reliability of their informants were questions of weight, not admissibility, proper for the triers of fact to consider. It was for the jury to weigh whether Edmonson's knowledge was based on nothing more than uncorroborated hearsay. Throughout her Petition, Petitioner obscures the legal difference between questions of admitting and of weighing the evidence. It is this confusion upon which Petitioner requests this Honorable Court for certiorari. Once the threshold of relevance is satisfied, the matter falls within the discretion of the trial court. *See, Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). A reviewing court accords great deference to the trial court's decision. *U.S. v. Peltier,* 585 F.2d 314 (8th Cir. 1979), *cert. denied,* 440 U.S. 945, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979).

Petitioner does not present a case meriting this Honorable Court's review on writ of certiorari. Supreme Court Rule 17.1 governs the standards for granting a writ of certiorari. Petitioner does not present a decision made by the trial court or by the Court of Appeals for the Seventh Circuit conflicting with other courts of appeals. Sup. Ct. R. 17.1(a). Petitioner also fails to set forth any instance where the Court of Appeals for the Seventh Circuit has decided on important questions of federal law which has not been, but should be, settled by this Honorable Court or has decided a federal question in a way conflicting with applicable decisions of this Honorable Court. Sup.Ct.R. 17.1(c). Therefore, Respondents respectfully submit that the grant of the petition for writ of certiorari would be improvident.

## III.

**The Trial Court Did Not Abuse Its Discretion By Permitting The Testimony Of Cheryl Sprehe Concerning The Details Of The Armed Robbery Committed By Decedents Immediately Prior To Their Respective Death.**

Respondents offered the testimony of Cheryl Sprehe to corroborate the reasonability of Captain Edmonson's perception of a threat from the decedents, one of whom was armed with a .44 caliber revolver. She testified very briefly that the suspects held a gun to her head and demanded money, that she was in fear for her life, and the suspects were serious. Although Petitioner claims in her petition at page 14 that "it is trial counsel's very clear recollection that her testimony was emotional (sic) and she was on the verge of violating the Court's admonition," the record does not confirm this unsubstantiated accusation. Indeed, the trial court made every attempt to ensure that Mrs. Sprehe's testimony would not be unfairly prejudicial. The court ruled before trial that testimony as to her pregnancy, being on the floor, having a gun held to her head, and being bound with tape would not be allowed. The court also very carefully cautioned Respondents' counsel about eliciting emotional testimony.

The restaurant clerk's testimony not only corroborated the reasonability of Captain Edmonson's state of mind, but also buttressed Respondents' position by demonstrating the Pawlisas' motive to resist arrest. Therefore, Cheryl Sprehe's testimony was certainly relevant. *Binks Mfg. Co. v. Nat. Presto Industries, Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Bowden v. McKenna, supra.* Great deference is due the trial court concerning its admission of this testimony. *U.S. v. Peltier, supra.* Respondents respectfully submit that Petitioner fails to set forth an issue meriting review on writ of certiorari pursuant to Sup. Ct. R. 17.1(a) or (c).

## IV.

**The Trial Court Did Not Err In Denying Petitioner's Motion For A Directed Verdict On The Issue Of Liability Against Respondent Edmonson As To Decedent Scott Pawlisa.**

Petitioner avers that Captain Edmonson negligently deprived Scott Pawlisa of his constitutional rights by accidentally shooting him at the same time he shot Brian Pawlisa. The underlying premise of this claim is that simple negligence establishes a constitutionally cognizable tort. Although *Parratt v. Taylor,* 451 U.S. 527 (1981), does not impose an independent state of mind requirement, the Eighth Amendment, *Estelle v. Gamble,* 429 U.S. 97 (1976), and the Fourteenth Amendment, *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), both require something more than simple negligence. Petitioner alleged violations of both the Fifth Amendment and Eighth Amendment as incorporated to the States through the Fourteenth Amendment. Petitioner's argument might possess some credence if the court had directed a verdict for Captain Edmonson; however, the trial court below submitted the question of liability to the jury, which found in Captain Edmonson's favor. Moreover, even if simple negligence were sufficient to prove a constitutional violation, the trial court properly submitted the case to the jury to determine whether Respondents were negligent, in fact.

The standard of reviewing a trial court's denial of a motion for directed verdict is whether, viewing all of the evidence in the light most favorable to the *Respondents,* there was sufficient evidence to warrant submitting to the jury the question of whether Captain Edmonson acted as a reasonably prudent person would have acted under similar circumstances. *Hannigan v. Sears, Roebuck & Co.,* 410 F.2d 285 (7th Cir. 1969), *cert. denied,* 396 U.S. 902 (1969). As the Court of Appeals for the Seventh Circuit stated in its opinion:

> The mere fact that Captain Edmonson did not intend to shoot Scott Pawlisa does not conclusively establish that he acted unreasonably or negligently under the circumstances of that evening. Whether it is negligent for someone to shoot at one person and accidentally hit another standing nearby depends on many factors, as this case well illustrates. (*Crawford v. Edmonson,* 764 F.2d 479, 487 (7th Cir. 1985).)

Furthermore, Petitioner does not dispute that Scott Pawlisa was guilty of armed robbery, even though he was not carrying a gun. *Illinois Revised Statutes,* Chapter 38, Section 5-2(c). The officers testified to the warning given and the dangers extant at the time of the shooting. It was the province of the jury to weigh this testimony and to determine whether Captain Edmonson's conduct violated Scott Pawlisa's constitutional rights. The trial court did not err in submitting this question to the jury. Respondents respectfully submit that this issue does not merit review pursuant to Sup. Ct. R. 17.1 (a) or (c).

## CONCLUSION

The Court of Appeals for the Seventh Circuit has not rendered an opinion in conflict with opinions of other courts of appeal or of this Honorable Court. The issues Petitioner raises do not involve important questions of federal law; rather, Petitioner's arguments are merely disagreements with the trier of facts' weighing of the evidence.

Therefore, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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618/549-0777

Attorneys for Respondents

# APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 81-5355

Sara Crawford, Special
Administrator
Plaintiff

v.

Jerry Edmonson, et al.
Defendant

### ORDER

(Filed - July 20, 1984)

THIS MATTER comes on for hearing this 20th day of July 1984, on Plaintiffs MOTION FOR NEW TRIAL, and the Court having heard arguments of counsel.

IT IS ORDERED that plaintiffs motion for a new trial is DENIED.

Date: July 20, 1984

/s/ W. J. Beatty
Judge

**JUDGMENT IN A CIVIL CASE**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 81-5355

Crawford, Sara L. Special
Administrator of the Estates of
Scott W. and Brian Pawlisa

v.

Edmonson, Jerry and Justice, Kermit

William L. Beatty, Judge

x **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of the Defendants, Jerry Edmonson and Kermit Justice, and against the Plaintiff, Sara L. Crawford.

Filed June 14, 1984

A. Marvin Helart
Clerk U.S. District Court
Southern District of Illinois
Alton Office